

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE CORRECTIONAL OFFICERS ASSOCIATION,	:	
	:	
Charging Party,	:	Review of Executive
	:	Director's Decision
v.	:	on Remand from
	:	Chancery Court
	:	
DELAWARE DEPARTMENT OF CORRECTION,	:	<u>U.L.P. No. 00-07-286</u>
	:	
Respondent.	:	

Appearances

David M. Boswell, Esq., Schmittinger & Rodriguez, P.A., for DCOA
Sherry Hoffman, Esq., DAG, for State

Background

The Delaware Correctional Officers Association ("DCOA") is an employee organization within the meaning of §1302(i) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), ("PERA"). DCOA is the exclusive representative of uniformed correctional officers of the Delaware Department of Correction, within the meaning of §1302(j) of the PERA.

The Department of Correction is an agency of the State of Delaware ("State") and a public employer within the meaning of §1302(n) of the PERA.

On July, 25, 2000, DCOA filed an unfair labor practice charge alleging the State violated §1307(a)(1), (2), (3), and (5) of the Public Employment Relations Act, when it unilaterally refused to continue to provide DCOA with home addresses of bargaining unit employees. The PERB Hearing Officer concluded that home addresses are reasonably necessary and relevant to DCOA in the performance of its representational duties under the PERA. The State was found to have violated §1307

(a)(1) and (5), and ordered to cease and desist from refusing to provide DCOA with the home addresses of bargaining unit employees.

The State requested the full Public Employment Relations Board review the decision of the Hearing Officer. The Board affirmed that decision on September 10, 2001.

The State appealed the Board's decision to the Court of Chancery pursuant to 19 Del.C. §1309. The Master in Chancery to whom this case was assigned, issued an Order of Remand on April 1, 2002. He directed PERB to consider, "Whether compliance with the Memorandum of Understanding is unlawful under this state's common law of privacy."

On April 24, 2002, the Board remanded this limited issue to the Executive Director for disposition. By agreement of the parties, an expedited responsive briefing schedule was established. The final brief was received on May 22, 2002, and the Executive Director issued his decision on June 10, 2002, finding compliance with the Memorandum of Understanding was not unlawful under Delaware's common law right of privacy.

On June 11, 2002, the State requested full PERB review of the Executive Director's June 10, 2002, decision on remand. Specifically, the State filed the following exceptions:

- 1) The legal effect of the Memorandum of Understanding (MOU) is within the scope of the Court's Order of Remand. The Court remanded the case because the PERB's "expertise is precisely in the types of agreements like the memorandum of understanding worked out between the parties."
- 2) The decision acknowledges that the common law right to privacy is balanced against the purpose for which the information is sought. The enforceability of the MOU is a necessary consideration in that balancing analysis.
- 3) The State, as the public employer and custodian of the employees' home addresses, had the duty to protect the employees' privacy.
- 4) The State acted in good faith to comply with the law and did not commit an unfair labor practice.
- 5) The Public Employment Relations Act, 19 Del.C. ch.13, does not expressly authorize the release of employee's home addresses.
- 6) The collective bargaining unit's access to public employees, the effect on collective bargaining and the potential liability of the State are qualitative factors that relate to the collective bargaining unit's right to obtain the home addresses of public employees. The enforceability of the MOU must be weighed with these factors to determine whether the

common law of privacy prohibits disclosure of the home addresses under the MOU.

- 7) The common law of privacy protects the home addresses of employees from disclosure.

On June 12, 2002, PERB conducted a representation election involving the bargaining unit of Department of Correction employees represented by DCOA. A majority of the votes cast were to decertify DCOA and certify an alternate labor organization, Correctional Officers Association of Delaware (COAD) as the unit's exclusive bargaining representative.

By letter dated June 12, 2002, DCOA requested the Board consider its request for attorney's fees "in whatever manner the Board finds most expeditious." Executive Director Long responded to the DCOA's request on June 21, 2002, in relevant part:

As you are no doubt aware, the Order of the Court of Chancery, dated April 1, 2002, did not reference the issue of attorney's fees. In fact, the Master's Report dated April 12, 2002, is quite limited in scope, remanding to PERB only the issue relating to the State's common law right of privacy.

Consequently, the Court, in its retention of jurisdiction, is in the best position to consider the issue of attorneys' fees or "other appropriate remedial orders."

DCOA responded by letter dated June 24, 2002:

I received your letter decision of June 21, 2002, indicating the issue of attorney's fees will not be considered by the Board because it is not within the scope of the remand order. In order to preserve the issue for DCOA, I believe it is necessary to request that this decision regarding attorney's fees be reviewed by the Board. This letter constitutes DCOA's notice of exception and request for review of the Board of the decision regarding attorneys' fees, which I assume will take place at the time the Board reviews all other aspects of this case on remand. The basis for the request for review is that the Board always retains ancillary jurisdiction to award attorneys' fees for matters before it, and that such authority is implicit in the order of remand.

On July 2, 2002, the State modified its request for review:

Subsequent to the State's request for review of the remand decision, the PERB held a decertification election to determine whether the Delaware Correctional Officers Association (DCOA) would continue as the bargaining representative for employees in the Department of Correction. On June 13, the PERB certified the results of that election, determining that DCOA was no longer the exclusive bargaining agent for those employees.

The decertification of the DCOA as the exclusive bargaining agent for Department of Correction employees raises serious questions of mootness and standing. *See General Motors Corporation v. New Castle County, et al.*, 701 A.2d 819, 822 (Del. 1979). Accordingly, the State requests that the PERB consider whether the proceeding is now moot or the DCOA lacks standing, and, if so, whether prior decisions of the PERB in this matter should be vacated.

By letter dated July 8, 2002, DCOA responded:

First, the questions of mootness and standing were not in the scope of the remand order. Accordingly, any such questions are not before the Board and should not be considered.

Second, while DCOA has been decertified, among other questions is whether the State breached its contractual obligation to DCOA. The courts routinely hear and decide arguments regarding contracts which have expired – employment contracts being a notable example. While decertification effectively terminates any and all contracts between DCOA and the State, DCOA has standing to defend on appeal its successful argument that the State violated the Public Employment Relations Act and breached the Memorandum of Understanding. DCOA's members paid for this litigation for the past two years, and are entitled to receive the benefit of their resources. In the State's case, General Motors Corporation v. New Castle County, 701 A.2d 819 (Del.Supr. 1997), the County lost standing when, while its appeal was pending, the Superior and then Supreme Courts, held in another case, that 9 Del.C. §8312(c) did not permit the County's appeal – reversing prior precedent. The question was whether the other party's cross-appeal, filed more than 30 days after the decision below, was also lost when the primary appeal of the County was mooted. There are no such issues in the case at bar.

Further, the State's duty to provide information – including member addresses – continues in effect today, and affects the same bargaining unit and employees so the issue is far from moot. Why should the same employees have to spend more money to begin new litigation over the same issue? The Board's decision impacts the ability of correctional unions to communicate with their members, and, further, impacts the ability of all public employee unions to communicate with their members. Thus, the Board's decision affects "matters of public importance," an exception to the mootness doctrine recognized in the General Motors decision, 701 A.2d at 823 n.5. *See also* McDermott Inc. v. Lewis, 531 A.2d 206 (Del.Supr. 1987) (where a change of circumstances made the appeal moot, the Court nonetheless will determine a question of public importance with a real impact on the law).

Fourth, there is no authority whatsoever for the State's request to vacate the Board's prior decisions under these circumstances. The State's refusal to honor its written commitment to provide DCOA with its members' addresses is what caused this litigation, and led to considerable expenditure of time and resources of the Board in resolving the parties' dispute – not once, but twice. Having twice consumed the Board's resources to decide an issue of important public interest, the State cannot undo the result. The State has no cognizable grounds on which to base its request that past orders be vacated. Further, because the past decisions are presently on appeal, the Board has no jurisdiction to vacate its prior orders at this time, in any event.

Fifth, another recognized exception to the non-mootness doctrine are situations that are capable of repetition. *See id.*; compare Roe v. Wade, 93 S. Ct. 705, 712 – 13 (1973) (situation capable of repetition, yet evading review, is not moot). *See also* Texaco Refining and Marketing Inc. v. Wilson, 570 A.2d 1146 (Del.Supr. 1990) (where the parties settled appeal from a ruling of an administrative agency, the Court "agreed to decide the legal issue because of its importance to the functioning of the Board and the prospect of recurrence.") The question of whether the State must provide employee addresses to their exclusive representative likely will recur soon

within the same bargaining unit, if it has not already.¹ Will the State have an opportunity to cripple the new union by depriving it of employee addresses, and then to try to drag out litigation over this issue until the new union is decertified?

DCOA requests that the Board find the issues of mootness and standing raised by the State are outside the scope of the remand order, and decline to consider them; or, alternatively, rule in DCOA's favor for all the reasons stated above.

The Board was provided with the record created before the Executive Director and met in a public hearing on July 17, 2002, to consider the State's request. The parties were afforded the opportunity to present oral argument. Consistent with the prior proceedings before the Board, Member Maron recused herself from these proceedings because of her prior involvement as an advocate for the State in a similar matter.

DISCUSSION

There are three issues before this Board on review of the Executive Director's decision on Remand from the Chancery Court in this matter, namely:

- 1) Whether this issue is moot, or that DCOA now lacks standing to proceed as a result of the decertification election of June 13, 2002;
- 2) Whether the Executive Director was correct in finding compliance with the Memorandum of Understanding is not unlawful under the State's common law of privacy; and
- 3) Whether the awarding of attorneys' fees is an appropriate remedial order under the facts of this case.

It would be patently unfair for the Public Employment Relations Board to dismiss this case as moot at this time for a number of reasons. Whether a public employer is prohibited from providing bargaining unit employees' home addresses to their exclusive representative (where that information is reasonably necessary and relevant to the union's representational duties) is an issue which affects parties

¹ While the State contends that DCOA no longer has an interest in the dispute, the State fails to suggest that the new union should be implied, to permit the continuance of the litigation with the new party in interest, or to disclose what position it has taken or will take with the new union regarding member addresses.

beyond those named in this case. Even though bargaining unit employees have chosen to replace DCOA with another union, the issues of communication and access are still very relevant to the bargaining unit employees and their representative.

Significant amounts of time and resources have already been expended to bring this case to this point. It is the interests of the employees in fair and effective representation which are actually seeking protection under this charge, rather than independent rights of the union. There is no question but that if this case is dismissed at this point, it will immediately be raised again by another union against the State as an employer. For these reasons, the Board declines to find the case is moot or that DCOA lacks standing to continue to pursue this matter.

Further, the Court directed this Board to consider the specific issue of the impact of the common law right of privacy on the Memorandum of Understanding entered into by these parties. The Court has retained jurisdiction, on appeal, over the underlying issue. Questions of standing and mootness relate specifically to the question of whether an unfair labor practice was committed and are within the jurisdiction of the Court at this point in the proceedings.

After reviewing the record and considering the State's new arguments, we conclude the State has failed to establish that the common law right of privacy constitutes a valid State interest that would render the parties Memorandum of Understanding contrary to law. We further find that the State has failed to establish that the common law right of privacy supersedes its obligation to provide relevant information to the exclusive bargaining representative of its employees under the Public Employment Relations Act.

The question of attorneys' fees is not an issue within the limited scope of the Court of Chancery's remand to this Board.

Based on the record created before the Hearing Officer and the arguments presented to this Board at its July 17, 2002 meeting, we find the issue raised in this case is not mooted by the decertification of DCOA. We further find no basis on which to overturn the Hearing Officer's decision on the merits of this case, and believe the issue of attorneys' fees is best addressed by the Court of Chancery which has retained jurisdiction over this case.

WHEREFORE, the Hearing Officer's decision is affirmed in its entirety, specifically in that the Memorandum of Understanding between the State and DCOA is found not to be unlawful under Delaware's common law of privacy. Consequently, the State is again ordered to cease and desist from refusing to provide home addresses of bargaining unit employees to the exclusive bargaining representative of those employees.

IT IS SO ORDERED

/s/Henry E. Kressman

HENRY E. KRESSMAN, CHAIRMAN
DELAWARE PUBLIC EMPLOYMENT RELATIONS BD.

/s/R. Robert Currie

R. ROBERT CURRIE, MEMBER
DELAWARE PUBLIC EMPLOYMENT RELATIONS BD.

Dated: 30 July 2002